

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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JOHN DOE AND JANE DOE, on behalf of)
themselves and as Guardians ad Litem for their)
minor child, PRESCHOOLER,)

02:03-CV-01500-LRH-RJJ

Plaintiffs,)

ORDER

v.)

CLARK COUNTY BOARD OF)
EDUCATION, et al.,)

Defendants.)
_____)

Presently before the court is plaintiff John and Jane Doe's (collectively, "Plaintiffs") Reply to Order Dated September 7, 2006 (# 211¹). Defendants Clark County Board of Education, Clark County School District, Carlos Arturo Garcia, Charlene Green, Michael Harley, Kay Davis, Peggie Cravish ("Cravish"), Darryl Wyatt ("Wyatt"), and Kathleen Lisanti ("Lisanti") (collectively, "Defendants") have filed an opposition (# 215), and Plaintiffs replied (# 217).

I. Factual and Procedural Background

This action was brought by Plaintiffs on behalf of themselves and their minor child, Preschooler, as a result of alleged improper treatment of Preschooler by Defendants. Presently

¹Refers to the court's docket number.

1 before the court is the judicial review of a state administrative decision concerning the Individuals
2 with Disabilities Education Act (“IDEA”). The court has previously outlined the factual
3 background of this case in its September 7, 2006, Order (# 208). As the parties are well aware of
4 that background, the court need not repeat the factual allegations of this case.

5 The court’s September 7, 2006, Order (# 208) permitted Plaintiffs to supplement the
6 administrative record by including the deposition testimony of substitute teacher Stuart Limbert
7 (“Limbert”) along with “any reports describing the use of aversive interventions on Preschooler,
8 including the Maureen Powers [(“Powers”)] electronic mail, and any police reports that contain
9 descriptions of the alleged abuse.” (September 7, 2006, Order (# 208) at 29.) In addition, the court
10 gave Plaintiffs thirty days from the date of the order to file points and authorities regarding the
11 claim for judicial review. Instead of complying with the court’s order, Plaintiffs filed a document
12 titled Plaintiffs’ Reply to Order Dated September 7, 2006 (# 211), which asks this court to
13 reconsider that portion of its September 7, 2006, Order that denied Plaintiffs’ request to supplement
14 the record with the testimony of Stephen C. Luce, Ph.D. (“Luce”). The court had previously
15 declined to allow supplementation of the record with the testimony of Luce because Plaintiffs failed
16 to present a solid justification for admitting the testimony. *Id.* at 34.

17 In failing to comply with the court’s September 7, 2006, Order, Plaintiffs did not request a
18 stay or an extension of time relating to that portion of the court’s order directing Plaintiffs to file
19 points and authorities regarding the claim for judicial review. Therefore, the court will construe
20 Plaintiffs’ Reply to Order Dated September 7, 2006, as both a motion to reconsider and as
21 Plaintiffs’ opening brief for judicial review.

22 **II. Legal Standard**

23 **A. Motion to Reconsider**

24 A motion to reconsider is appropriately brought under either Rule 59(e) or Rule 60(b) of the
25 Federal Rules of Civil Procedure. *Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1442 (9th Cir. 1991). In
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1 this case, Plaintiffs have not identified which rule governs their motion. However, since Plaintiffs
2 motion was filed well past the ten-day period allowed in Rule 59(e), this court will treat the motion
3 as one filed pursuant to Rule 60(b). Rule 60(b) of the Federal Rules of Civil Procedure “provides
4 for reconsideration only upon a showing of (1) mistake, surprise, or excusable neglect; (2) newly
5 discovered evidence; (3) fraud; (4) a void judgment; (5) a satisfied or discharged judgment; or (6)
6 ‘extraordinary circumstances’ which would justify relief.” *Id.* (citing Fed. R. Civ. P. 60(b)).

7 **B. Judicial Review**

8 IDEA was enacted “to ensure that all children with disabilities have available to them a free
9 appropriate public education [(“FAPE”)] that emphasizes special education and related services
10 designed to meet their unique needs and prepare them for further education, employment, and
11 independent living.” 20 U.S.C. § 1400(d). “An appropriate public education does not mean the
12 absolutely best or potential-maximizing education for the individual child. . . . The states are
13 obliged to provide a basic floor of opportunity through a program individually designed to provide
14 educational benefit to the handicapped child.” *Union Sch. Dist. v. Smith*, 15 F.3d 1519, 1524 (9th
15 Cir. 1994).

16 In case of a dispute between the school district and the parents, IDEA permits the parents of
17 disabled children to “present complaints . . . with respect to any matter relating to the identification,
18 evaluation, or educational placement of the child, or the provision of a free appropriate public
19 education to such child.” 20 U.S.C. § 1415(b)(6). The statute provides that a parent who submits
20 such a complaint “shall have an opportunity for an impartial due process hearing.” 20 U.S.C. §
21 1415(f)(1)(A). IDEA further permits any party aggrieved by the finding and decision in the due
22 process hearing to file a civil action in state or federal court. 20 U.S.C. § 1415(i)(2). In any action
23 seeking judicial review of the administrative decision, “the court . . . (i) shall receive the records of
24 the administrative proceedings; (ii) shall hear additional evidence at the request of a party; and (iii)
25 basing its decision on the preponderance of the evidence, shall grant such relief as the court
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1 determines is appropriate.” 20 U.S.C. § 1415(i)(C).

2 Judicial review of a state hearing officer’s decision involves two steps. *Smith*, 15 F.3d at
 3 1524. “First, the court must determine whether the rigorous procedural requirements of IDEA have
 4 been met. Second, the court must determine whether the state has met the substantive component
 5 of IDEA - the requirement that the state provide an ‘appropriate’ education.” *Id.* (citing *Bd. of*
 6 *Educ. of Hendrick Hudson Central Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 206-07
 7 (1982)).

8 The standard of review to be conducted pursuant to IDEA has been described as a
 9 “modified *de novo* review.” *S.H. v. State-Operated Sch. Dist. of City of Newark*, 336 F.3d 260, 270
 10 (3d Cir. 2003); *see also Amanda J. ex rel. Annette J. v. Clark County Sch. Dist.*, 267 F.3d 877, 887
 11 (9th Cir. 2001) (“Complete *de novo* review . . . is inappropriate.”). This modified *de novo* review
 12 requires the district court to give “due weight” to the hearing officer’s decision. *Capistrano*
 13 *Unified Sch. Dist. v. Wartenberg*, 59 F.3d 884, 891 (9th Cir. 1995). This court cannot substitute its
 14 notion of sound educational policy for those of the school authorities. *Ojai Unifed Sch. Dist. v.*
 15 *Jackson*, 4 F.3d 1467, 1472 (9th Cir. 1933). The amount of deference due to state educational
 16 agencies is a matter for discretion of the courts. *Gregory K. v. Longview Sch. Dist.*, 811 F.2d 1307,
 17 1311 (9th Cir. 1987). However, “the amount of deference bestowed upon the hearing officer is
 18 increased where her findings are ‘thorough and complete.’” *Adams v. State of Oregon*, 195 F.3d
 19 1141, 1145 (9th Cir. 1999) (quoting *Smith*, 15 F.3d at 1524).

20 **III. Discussion**

21 Plaintiffs seek reconsideration of the court’s September 7, 2006, Order that denied
 22 Plaintiffs’ request to supplement the record with the testimony of Luce. Initially, Plaintiffs contend
 23 that they are entitled to a jury trial for their IDEA claim. Substantively, Plaintiffs argue that
 24 supplementation is necessary in order for the court fo make a final adjudication. Plaintiffs contend
 25 that, prior to the administrative hearing in August of 2003, they were unaware of the frequency,
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1 intensity and number of perpetrators involved in the violations that occurred in the 2002-2003
2 school year. Plaintiffs argue that they were prevented from calling Luce as a witness because they
3 were unaware of the alleged abuse. Defendants argue that review of the administrative record
4 establishes that there is no basis for modification of the administrative decision. Defendants further
5 argue that the supplemental evidence is cumulative of two isolated incidents related to Preschooler.

6 Plaintiffs initially argue that they are entitled to a jury trial for their IDEA claim because
7 they are seeking legal relief. Plaintiffs are incorrect. Judicial review pursuant to IDEA is a
8 function of the court. Section 1415(i)(C)(iii) expressly states that in any action seeking judicial
9 review of the administrative decision, “*the court . . . basing its decision on the preponderance of the*
10 *evidence, shall grant such relief as the court determines is appropriate.*” 20 U.S.C. § 1415(i)(C)(iii)
11 (emphasis added). Furthermore, the Ninth Circuit has described the process of judicial review
12 pursuant to IDEA as one that requires *the court* to determine whether there is a procedural violation
13 and whether the state has met the substantive component of IDEA. *Smith*, 15 F.3d at 1524 (*citing*
14 *Rowley*, 458 U.S. at 206-07.) Upon careful examination of the supplemental evidence and the
15 record as a whole, the court finds no basis for reconsidering its September 7, 2006, Order. The
16 points and authorities filed by the parties focus solely on the supplementation permitted by the
17 court. A review of that evidence further shows no error in the final administrative decision of the
18 State Review Officer.

19 The supplemental testimony of Limbert shows that Limbert saw Cravish pick Preschooler
20 up by the arm in a jerking fashion. (Opp’n to Pls.’ Reply to Order Dated September 7, 2006
21 (# 215), Dep. of Stuart Limbert at 17:15-17.) However, Limbert further testified that he didn’t see
22 anything that was “totally drastic or anything.” *Id.* at 20:13-17. Limbert also stated that
23 Preschooler never appeared to be hurt from this action, but did cry occasionally because he was
24 upset. *Id.* at 28:15-21. Limbert testified that he remembered seeing Cravish’s facial expressions
25 and that she would get very upset at the kids. *Id.* at 3-8.

1 The next piece of supplemental evidence is an electronic mail dated April 3, 2003, from
2 Maureen Powers to several Clark County School District staff members. In that email, Powers
3 reports that an itinerant staff witnessed the classroom teacher take the hands of a child and made
4 the child hit himself in the face approximately ten times. (Pls.' Reply to Order Dated September 7,
5 2006 (# 211), Ex. 2 at 2.) Powers also filled out a Statement Report dated April 3, 2003, describing
6 the same event.² *Id.* at 3. In the Statement Report, Powers states that teacher Patricia Been
7 ("Been") asked Lisanti and teaching assistant Lynette Lofgren ("Lofgren") to help determine when
8 the "incident" occurred. *Id.* at 5. Lisanti and Lofgren stated that they couldn't pinpoint the date
9 because "it happened so often" that "they wouldn't be able to isolate the date of that incidence." *Id.*

10 Next, Plaintiffs have attached a letter dated September 27, 2002, from Gina and Rich
11 Seideman addressed to Wyatt. The letter described an incident where an aide picked up
12 Preschooler under one arm, threw him on a mat and started yelling at him. *Id.* at 8. However,
13 Plaintiffs have also attached a second copy of the same letter that indicates a student other than
14 Preschooler was the one who was picked up and thrown on the mat. *Id.* at 11.

15 Following the Seideman letter is an incident report dated March 3, 2003. The reporting
16 officer states that Been observed Lisanti take the wrists of Preschooler and slap him in the head
17 with force. *Id.* at 18. The report also indicates that Lynette Lofgren made a statement to the officer
18 indicating that Lisanti picked Preschooler up and "put him in a chair forcefully, about as hard as he
19 threw himself on the ground." *Id.*

20 An Investigative Report dated April 28, 2003, also described an incident where Lisanti
21 forced Preschooler to hit himself with his own hands. *Id.* at 19, 20. The report indicates that there
22 was no reported injury that would support the allegations being made. *Id.* at 20. The report further

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24 ²There is no evidence that any alleged events of abuse of other children had any effect on Preschooler's
25 right to FAPE. Furthermore, any evidence relating to the alleged abuse of other children is beyond the scope
26 of the court's order allowing supplementation of the administrative record. Because most of the evidence
describing these events is not part of the administrative record and is irrelevant to Plaintiffs' IDEA claim, these
events will not be addressed by the court.

1 indicates that the reporting officer spoke with Lisanti and that Lisanti indicated that she had taken
2 the wrists of children who were hitting themselves, slowed the motion and used verbal cues to
3 communicate to the child what she wanted him to do. *Id.* at 22.

4 In sum, the supplemental evidence describes four alleged incidents of mistreatment. First,
5 there is evidence that Cravish picked preschooler up by the arm in a jerking fashion. Second, there
6 is evidence that Lisanti took the hands of Preschooler and made him hit himself several times.
7 Third, there is evidence that Lisanti picked up either Preschooler or a different child and threw the
8 child on a mat and yelled at that child. Finally, there is evidence that Lisanti picked Preschooler up
9 and forcefully put him in a chair.

10 During the administrative hearing, Preschooler's mother testified concerning Lisanti's
11 teaching techniques by stating, "it was obvious when you observed how she interacted with the
12 children that she was very grabby and very - not very gentle in a positive redirection. I never saw
13 that going on in the classroom." (Administrative Record, Testimony of Mrs. Doe, File 1 at 200:3-
14 7.) Preschooler's mother further testified that she observed Lisanti using aggressive teaching
15 techniques. *Id.* at 200:16-201:1. Similarly, Preschooler's father testified that he had been told by a
16 police detective that "there might be some harsh teaching practices being used." (Administrative
17 Record, Testimony of Mr. Doe, File 1 at 226:6-7.)

18 Patricia Been testified that she observed Lisanti take the hands of Preschooler in her hands
19 and made Preschooler hit himself. (Administrative Record, Testimony of Patricia Been, File 2 at
20 502:13-17.) Been further testified that Lianti stated, "Well, that'll break you from doing that." *Id.*
21 at 502:18-19. Teacher's Aide Lofgren also testified that she observed this incident.
22 (Administrative Record, Testimony of Lynette Lofgren, File 3 at 626:15-17.)

23 Gina Seideman, the parent of another child, testified that she observed Cravish respond to
24 Preschooler scratching another child by lifting Preschooler by one arm and throwing him two feet
25 across the room. (Administrative Record, Testimony of Gina Seideman, File 3 at 644:11-645:22.)
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1 Richard Seideman corroborated this testimony. (Administrative Record, Testimony of Richard
2 Seideman, File 3 at 680:1-17.)

3 Thus, The above evidence demonstrates that Plaintiffs were aware of the allegations of
4 abuse at the time the administrative hearing was conducted. As the court stated in its September 7,
5 2006, Order, "Plaintiffs have failed to present a solid justification for admitting the testimony of
6 Luce as additional evidence." (September 7, 2006, Order (# 208) at 34.) Although the
7 supplemental evidence may serve to strengthen the allegations, Plaintiffs were aware of the two
8 most significant events and should have presented the testimony of Luce at the administrative
9 hearing. Moreover, Plaintiffs have failed to show "(1) mistake, surprise, or excusable neglect; (2)
10 newly discovered evidence; (3) fraud; (4) a void judgment; (5) a satisfied or discharged judgment;
11 or (6) 'extraordinary circumstances' which would justify relief." *See Fuller*, 950 F.2d at 1442.

12 With respect to the motion for judicial review, the above discussion of the supplemental
13 evidence and the testimony at the administrative hearing demonstrates that the allegations of abuse
14 and improper treatment were before the Hearing Officer and the State Review Officer.
15 Furthermore, this court agrees with the State Review Officer that, assuming the alleged
16 mistreatment of Preschooler occurred as described by Plaintiffs, Plaintiffs have failed to establish
17 how such mistreatment interfered with Preschooler's FAPE. (Administrative Record, State Review
18 Officer's Decision, File 10 at 928-29.) There is simply no evidence indicating that the alleged
19 mistreatment of Preschooler violated Preschooler substantive rights under IDEA. As Plaintiffs
20 have only sought review of the administrative decision with respect to whether the alleged
21 mistreatment of Preschooler resulted in a denial of FAPE, the court will affirm the final decision of
22 the State Review Officer.

23 At this point, the only remaining issue in this case is Plaintiffs' fifth cause of action
24 pursuant to the Fourteenth Amendment to the United States Constitution for the alleged excessive
25 corporal punishment of Preschooler. The court has previously denied a motion to dismiss
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1 regarding this cause of action. (September 7, 2006, Order (# 208) at 27.) However, no motion for
2 summary judgment has been filed. As this is the only remaining claim in this case and it may be a
3 matter that can be determined in a manner that will either expedite trial or eliminate the need for
4 trial, the court will grant Defendants leave to file a motion for summary judgment within ten (10)
5 days from the date of this order. If such a motion is filed, Plaintiffs shall have ten (10) days in
6 which to file an opposition. No reply shall be filed. If Defendants do not file a motion for
7 summary judgment, the parties shall have thirty (30) days within which to lodge with the court a
8 proposed written joint pretrial order.

9 IT IS THEREFORE ORDERED that Plaintiffs' motion to reconsider and appeal of the final
10 decision of the State Review Officer (# 211) is hereby DENIED. The final decision of the State
11 Review Officer is AFFIRMED.

12 IT IS FURTHER ORDERED that Defendants shall have ten (10) days from the date of this
13 order in which to file a motion for summary judgment with respect to the remaining cause of action
14 in this case. If such a motion is filed, Plaintiffs shall have ten (10) days in which to file an
15 opposition. No reply shall be filed. If Defendants do not file a motion for summary judgment, the
16 parties shall have thirty (30) days within which to lodge with the court a proposed written joint
17 pretrial order.

18 IT IS SO ORDERED.

19 DATED this 27th day of August, 2007.



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22 LARRY R. HICKS
23 UNITED STATES DISTRICT JUDGE
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